No. 15114

United States
Court of Appeals
for the Ninth Circuit

CHARLES J. FRIDAY, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Idaho, Southern Division

FILED

JUN 11 1956

PAUL P. O'BRIEN, CLERK

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In the United States District Court, District of Idaho, Southern Division

No. 3121

CHARLES J. FRIDAY, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

COMPLAINT

I.

This is a tort claim asserted by Plaintiff against the United States of America under the provisions of Title 28 United States Code, Section 1346 (b).

II.

That all of the acts or omissions hereinafter complained of by the Plaintiff were committed within the Southern Division of the Federal District of Idaho.

III.

That on the 30th day of October, 1953, at approximately 8:00 A.M. of said day, the Plaintiff, Charles J. Friday, was driving his certain 1951 Kaiser 2- door sedan automobile in a lawful manner in a westerly direction on U. S. Highway 30 at a point on said highway approximately 3½ miles west of Boise, Ada County, Idaho; that at said time and place, one Ralph Lacy, was driving a certain Willys Jeep automobile in an easterly direction along said highway; that at said time and place, one Francis E. Fennert, negligently, carelessly and recklessly

drove a certain Chevrolet panel truck belonging to the United States of America with great force into the rear of the vehicle being driven by the said Ralph Lacy and thereby propelled the said vehicle driven by the said Ralph Lacy across the center line of said highway into the path of and directly into Plaintiff's said automobile causing the said automobiles to collide, destroying Plaintiff's automobile and causing severe and permanent injuries to Plaintiff.

IV.

That said Chevrolet panel truck was at that time being driven by the said Francis E. Fennerty, and was, at said time, owned by and was the property of the United States of America; that said Francis E. Fennerty was, at that time, an employee of the United States of America, and was then and there acting in the scope of his office and employment on behalf of the said United States of America; that the United States, acting by and through its agents and servants, and in particular, its agent and servant, S. W. Wells, was negligent, reckless and careless in directing the said Francis E. Fennerty to drive said government vehicle to a certain government soil and water testing project near Caldwell, Idaho, the evening of October 29, 1953, and was negligent, reckless and careless in authorizing and directing the said Francis E. Fennerty to remain on said project and continuously work throughout the night of October 29, 1953, and to thereafter drive said government vehicle from that point and return to Boise, Idaho, which he was doing at the time of

the above described collision without allowing the said Francis E. Fennerty to obtain sufficient sleep or rest before his return to Boise, Idaho, and that the fatigued condition of the said Francis E. Fennerty was a contributing factor to the negligent and careless operation of said United States' vehicle prior to and at the time of the collision with the automobile of Plaintiff.

V.

As a result of said collision, the above described 1951 Kaiser automobile belonging to Plaintiff was destroyed to the damage of Plaintiff in the sum of $1120.00; that by reason of said collision and as a proximate result of the negligence of the Defendant, and of the said Francis E. Fennerty, and of the immediate supervisor of the said Francis E. Fennerty, to-wit, S. W. Wells, the Plaintiff suffered fractures of the 5th, 6th, 7th and 8th ribs on the right side, contusions in the anterior chest and sternal areas, dislocation or subluxation of the right hip, fractures of the posterior acetabalar lip, abrasions and contusions in the right pre-tibial area, contusions and severe injuries to the external popliteal nerve and other nerves, multiple contusions, lacerations, and severe shock, and suffered great pain, loss of sleep and permanent and crippling injuries to the right leg and hip, which injuries necessitated hospitalization and medical care; that Plaintiff has to date hereof expended the sum of $266.85 for his medical care and hospitalization to his damage in the sum of $266.85; that Plaintiff has not recovered from the injuries which he suffered in said accident and con-

tinues to require medical care and has incurred and suffered crippling and permanent injuries resulting in at least a permanent 50% loss of Plaintiff's wage earning ability to his damage in the sum of $60,000.00.

VI.

That said Francis E. Fennerty just prior to the time of the collision had negligently and carelessly fallen asleep while driving the said United States Government vehicle; that one S. W. Wells was an employee of the United States Government then employed in the U. S. Geological Survey, Ground Water Branch, and was the immediate supervisor of the said Francis E. Fennerty and had negligently, recklessly and carelessly required and compelled the said Francis E. Fennerty to drive the said United States Government vehicle without adequate rest and sleep, and under the circumstances of the collision, the said Francis E. Fennerty as a private person, and the said S. W. Wells as a private person would be liable to Plaintiff for the damages resulting from their negligence and the resulting collision, and the United States of America, if a private employer, would be liable to Plaintiff for such damages suffered from said accident.

Wherefore, Plaintiff prays judgment against the United States of America for the sum of $61,386.85, together with costs incurred herein.

FREDRICKS & ROBERTS,
/s/ By THERON E. ROBERTS,
Attorneys for Plaintiff

[Endorsed]: Filed Oct. 12, 1954.

[Title of District Court and Cause.]

ANSWER

Comes now the United States of America and answers plaintiff's complaint as follows:

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

The Court lacks jurisdiction of any claim based on the alleged negligent acts of Francis E. Fennerty's supervisor set out in the complaint for the reason that if the said supervisor performed the alleged acts it was in the performance of a discretionary function or duty and suit is prohibited by the provisions of 28 USC 2680(a).

Third Defense

I.

Defendant admits the allegations contained in paragraph I.

II.

Defendant denies the allegations contained in paragraph II.

III.

Answering paragraph III defendant admits that at approximately the time and place mentioned in plaintiff's complaint that Francis E. Fennerty was

driving a certain Chevrolet panel truck belonging to the United States of America travelling in an easterly direction along Highway 30; that one Ralph Lacy was driving a certain Willys Jeep automobile in an easterly direction along said highway; that Charles J. Friday was driving a certain 1951 Kaiser two-door sedan automobile in a westerly direction on said highway; and that the said Chevrolet panel truck struck the rear of said Jeep; and that said Jeep collided with said 1951 Kaiser automobile; and defendant denies each and every other allegation of paragraph III.

IV.

Answering paragraph IV defendant admits that said panel truck was the property of the defendant on the 30th day of October, 1953, and was being operated by Francis E. Fennerty, who was an employee of the defendant on that date, and denies each and every other allegation contained in paragraph IV of the complaint.

V.

Answering paragraph V defendant admits that by reason of the collision of the aforesaid Jeep and Kaiser automobile that the plaintiff suffered fractures of the fifth, sixth, seventh and eighth ribs on the right side, and a simple fracture of the posterior acetabalar rim on the right side. Defendant specifically denies that said injuries were the result of the negligence of the defendant and of Francis E. Fennerty and of the immediate supervisor of the said Francis E. Fennerty; and further denies that plain-

tiff suffered crippling and permanent injuries. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in paragraph V of the complaint, and therefore denies each and every other allegation in said paragraph V.

VI.

Defendant denies each and every other allegation contained in the complaint.

Fourth Defense

Any injuries sustained or suffered by plaintiff at the time and place and on the occasion mentioned in the complaint were caused in whole or in part or were contributed to, by the negligence or fault or want of care of the plaintiff, and not by any negligence or fault or want of care on the part of Francis E. Fennerty, his supervisor, or this defendant.

Fifth Defense

Plaintiff, on or about the 7th day of December, 1953, for a valuable consideration, duly executed and delivered to Francis E. Fennerty, the employee of the defendant referred to in the complaint of the plaintiff, a general release in writing, whereby the plaintiff duly released the said Francis E. Fennerty therefrom, and forever discharged him from the alleged cause of action set forth in the complaint, and from any and all claims of the plaintiff against the said Francis E. Fennerty. The said release by its

terms released the defendant and forever discharged it from the alleged cause of action set forth in the complaint, and from any and all claims of the plaintiff against the defendant. A copy of the release is attached hereto as Exhibit A.

Sixth Defense

Prior to the commencement of this action and on or about the 7th day of December, 1953, the said Francis E. Fennerty, the employee of the defendant, duly paid, satisfied and discharged the claim of the plaintiff set forth in the complaint herein by payment to the plaintiff of the sum of $5,000.00.

SHERMAN F. FUREY, JR.,
United States Attorney

/s/ By MARION J. CALLISTER,
Assistant U. S. Attorney

EXHIBIT A

RELEASE IN FULL

For and in consideration of the sum of Five Thousand ($5,000.00) and other valuable considerations, the receipt of which is hereby acknowledged, the undersigned do hereby release and forever discharge Francis E. Fennerty and Phyllis C. Fennerty, jointly and severally, from any and all claims, demands, damages, expenses, costs, causes of actions and suits growing out of and arising by reason of that certain accident which occurred on or about October 30, 1953, on U. S. Highway 30, at or near

2½ miles west of Boise, Ada County, Idaho, inflicting upon the undersigned serious personal injuries and property damages.

It is understood and agreed that this is a full and final release of all liability of whatever character, kind or nature, growing out of the above captioned accident by reason of personal injuries and property damages sustained by the undersigned as against the said Francis E. Fennerty and Phyllis C. Fennerty.

It is further understood and agreed that payment hereunder is not and shall not be construed as admission of liability by the said Francis E. Fennerty and Phyllis C. Fennerty and that this is a full, complete and final compromise settlement of disputed claims as between the parties hereto.

It is further understood and agreed that this release, as stated herein, shall be a bar to any action or suit against the said Francis E. Fennerty and Phyllis C. Fennerty by the undersigned for any claimed negligence on their part, but this release shall not inure to the benefit of any other tort feasor, upon whom and against who a liability may be predicated by reason of independent negligence of, acts by, or liability on the part of said other tort feasor or tort feasors causing or contributing to the damages and injuries suffered by the undersigned.

Dated this 7th day of December, 1953, at Seattle, State of Washington.

CHARLES J. FRIDAY
DOROTHY W. FRIDAY

Witness:

FRED C. MATHERRY

Subscribed and sworn to before me this 7th day of December, 1953, at Seattle.

THOS. MARSHALL,

Official Title: Notary Public in and for the State of Washington, residing at Seattle.

Affidavit of Service Attached.

[Endorsed]: Filed Feb. 14, 1955.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Defendant, United States of America, requests plaintiff, Charles J. Friday, within 10 days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That the Release attached to the Answer of the defendant as Exhibit A is a true and correct copy of the Release executed by the plaintiff, Charles J. Friday, and his wife, Dorothy W. Friday, on or about the 7th day of December, 1953.

2. That said Release was, for a valuable consideration, duly executed by Charles J. Friday and his wife, Dorothy W. Friday, and delivered to Francis

E. Fennerty on or about the 7th day of December, 1953.

3. That Francis E. Fennerty referred to in the Complaint as an employee of the defendant, United States of America, is the same Francis E. Fennerty referred to in the said Release.

4. That the accident referred to in said Release is the same accident referred to in the Complaint of the Plaintiff filed herein.

SHERMAN F. FUREY, JR.,
United States Attorney

/s/ By MARION J. CALLISTER,
Assistant U. S. Attorney

Affidavit of Service Attached.

[Endorsed]: Filed Mar. 24, 1955.

[Title of District Court and Cause.]

ANSWER TO REQUEST FOR ADMISSIONS

Comes now Plaintiff, Charles J. Friday, and for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, and makes the admissions requested by Defendant as follows, to-wit:

1. That the Release attached to Defendant's Answer as "Exhibit A" is a true and correct copy of the release executed by the Plaintiff, Charles J. Fri-

day, and his wife, Dorothy W. Friday, or or about the 7th day of December, 1953.

2. That said Release was, for a valuable consideration, duly executed by Charles J. Friday and his wife, Dorothy W. Friday, and delivered to Francis E. Fennerty on or about the 7th day of December, 1953.

3. That Francis E. Fennerty referred to in the Complaint is an employee of the Defendant, United States of America, and is the same Francis E. Fennerty referred to in the said release.

4. That the accident referred to in the said release is the same accident referred to in the Complaint the Plaintiff filed herein.

Dated this 4th day of April, 1955.

FREDRICKS & ROBERTS
/s/ By THERON E. ROBERTS,
Attorneys for Plaintiff

Receipt of Copy Attached.

[Endorsed]: Filed Apr. 6, 1955.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

The defendant, United States of America, hereby moves the court to enter summary judgment for the defendant, in accordance with the provisions of Rule 56(b) and (c) of the Rules of Civil Procedure, on the ground that the pleadings and admissions on file

herein show that the defendant is entitled to judgment as a matter of law.

SHERMAN F. FUREY, JR.,
United States Attorney
/s/ By MARION J. CALLISTER,
Assistant U. S. Attorney

Affidavit of Service Attached.

[Endorsed]: Filed May 13, 1955.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Clark, District Judge.

This is an action brought by the plaintiff under the Tort Claims Act. The plaintiff allegedly was injured in a three-car collision in which one Francis E. Fennerty, driving a vehicle belonging to the United States, drove this said vehicle into the rear of a car driven by one Ralph Lacy propelling the latter's vehicle across the highway center line into the path of this plaintiff's auto, causing them to collide.

The defendant has pleaded a release executed by the plaintiff herein and his wife to Francis E. Fennerty, the employee of the defendant, whereby the plaintiff duly released the said Francis E. Fennerty from any claims. The plaintiff in response to requests for admission admits the execution of the Release for a valuable consideration. Upon these ad-

missions and the pleadings herein, the defendant moved for Summary Judgment. The Court has fully considered the same together with briefs and oral argument. There is no material dispute as to the facts.

The plaintiff contends that in addition to the negligence of Fennerty, Fennerty's immediate superior, one S. W. West, was negligent in directing Fennerty to drive this vehicle to a place near Caldwell, Idaho, and work there the night of October 29, 1953, and to return to Boise without allowing the said Fennerty to obtain sufficient sleep or rest.

The act of the supervising officer was certainly not a proximate cause of the accident in question. Further this act, being discretionary, would come within the classification of suits prohibited by the statute. Dalehite v. United States, 346 U.S. 15.

The only person's acts then, through which the United States could be held liable, are the acts of Fennerty. The release particularly releases Fennerty but states that it "shall not inure to the benefit of any other tortfeasor, upon whom and against whom a liability may be predicated by reason of independent negligence of, act by, or liability on the part of said other tortfeasor or tortfeasors."

The law puts master and servant relations in the position to be held as joint tortfeasors in situations such as this, not independent tortfeasors, and therefore the Government, as the employer in this case, has been fully released by the Release on file herein. The release to the servant necessarily releases the employer. U. S. vs. First Security Bank of Utah,

208 F. 2d 424; Johns v. Hake, 131 Pac. 2d 933 (Wash.).

For these reasons the Motion for Summary Judgment should be granted. Counsel for Defendant may prepare and submit Judgment.

January 9, 1956.

[Endorsed]: Filed Jan. 10, 1956.

In the United States District Court for the District of Idaho, Southern Division

No. 3121

CHARLES J. FRIDAY, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

SUMMARY JUDGMENT

The motion of the defendant for summary judgment pursuant to Rule 56(c) of the Rules of Civil Procedure, having been presented, and the court being fully advised,

The court finds that the defendant is entitled to a summary judgment as a matter of law.

It Is Therefore Ordered, Adjudged and Decreed that the defendant's motion for summary judgment be, and the same hereby is granted, that the plaintiffs have and recover nothing by their suit, that the

defendant, United States of America, go hence without day, and that defendant recover its costs and charges in this behalf expended and have execution therefor.

Dated this 18th day of January, 1956.

/s/ CHASE A. CLARK,
Chief Judge, U. S. Dist. Ct.

[Endorsed]: Filed Jan. 20, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Charles J. Friday, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 20th day of January, 1956.

FREDRICKS & ROBERTS
/s/ By THERON E. ROBERTS,
Attorneys for Appellant,
Charles J. Friday

[Endorsed]: Filed Mar. 19, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers is the complete original record filed in this office in this case, to-wit:

1. Complaint
2. Summons with return thereon
3. Motion and Order for Additional Time to Answer
4. Answer
5. Request for Admissions
6. Answer to Request for Admissions
7. Motion for Summary Judgment
8. Minutes of the Court of August 22, 1955
9. Memorandum Opinion
10. Summary Judgment
11. Notice of Appeal
12. Cost Bond on Appeal
13. Stipulation to send complete record to Court of Appeals

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 24th day of April, 1956.

[Seal] ED. M. BRYAN,
Clerk.

[Endorsed]: No. 15114. United States Court of Appeals for the Ninth Circuit. Charles J. Friday, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed: April 26, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15114

CHARLES J. FRIDAY, Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

STATEMENT OF POINTS ON APPEAL

The Points upon which Appellant will rely on appeal are:

1. The Court erred in finding that Defendant was entitled to a summary judgment as a matter of law.

2. The Court erred in granting Defendant's motion for summary judgment.

3. The Court erred in holding that the Defendant

was not liable under the Tort Claims Act for the negligent acts as set forth in Appellant's Complaint of S. W. West, a United States Government employee, and in holding that the acts of S. W. West were not the proximate cause of Appellant's injuries and in holding that such acts were discretionary and therefore within the classification of suits prohibited by the Tort Claims Act.

4. The Court erred in holding that the release of Francis E. Fennerty, a United States Government employee, released also the United States Government from liability to Plaintiff under the Tort Claims Act.

Dated this 25th day of April, 1956.

FREDRICKS & ROBERTS

/s/ By THERON E. ROBERTS,
Attorneys for Appellant

Acknowledgment of Service Attached.

[Endorsed]: Filed April 26, 1956. Paul P. O'Brien, Clerk.